No. 93-159

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

CHRIS ROWENHORST, PETITIONER

v.

VIOLA MITCHELL, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether IRS collection officers are entitled to absolute immunity for fabrication of false evidence which leads to unlawful arrest and detention of an innocent citizen, where the fabrication is later revealed on video tape.

2. Whether IRS collection officers are entitled to qualified immunity for fabrication of false evidence which leads to unlawful arrest and detention of an innocent citizen, where the fabrication is later revealed on video tape.

3. Whether an innocent citizen can maintain a constitutional tort action against IRS collection officers who, as evidenced by a video tape, fabricate false evidence, where a prosecutor makes a judgment, relying upon this evidence, to unlawfully arrest and detain the citizen.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner, Chris Rowenhorst, is a private citizen in Fullerton, California.

Respondents, Viola Mitchell and Tracy L. Brown, are IRS collection officers.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Chris Rowenhorst respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 3a - 12a) is unreported. The order of the District Court (App.,

infra, 13a - 14a) is unreported.

JURISDICTION

The Court of Appeals entered its decision (App., *infra*, 1a - 2a) on December 30, 1992. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 3, 1993. App., infra, 1a - 2a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §1291, and the District Court had jurisdiction under 29 U.S.C. §1132(e).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . persons . . . to be

seized.

U.S. Constitution, Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Overview

Petitioner's amended Bivens complaint claims that an in-store video camera in his Fullerton, California pawn shop captures this simple fact: two IRS collection officers fabricated false evidence which led to Petitioner's illegal arrest and detention. IRS collection officers falsely stated to an independent IRS investigator that Petitioner threatened to shoot them and that they had to walk out of Petitioner's store with their backs against the door. As a result, Petitioner was arrested, detained and a criminal complaint was filed. Upon review of the video tape, the prosecutor

successfully moved to dismiss the criminal complaint.

B. IRS Collection Officers Visit Petitioner's Pawn Shop

On January 23, 1991, IRS collection officers, Viola Mitchell and Tracy L. Brown, Respondents, met with Petitioner at his pawn shop for the purpose of collecting income taxes. Petitioner informed the officers he could not pay the debt and refused to permit them entry onto his property to seize his assets to satisfy the debt. The officers then informed Petitioner that they would seek a court order for purpose of entering the property and seizing assets.

C. IRS Collection Officers' Fabrication of False Evidence

The officers reported to an independent IRS inspector, Peter Darvas, that Petitioner had placed his hand on a gun, stating, "What do you want me to do, kill?" The officers also told the

investigator that they "understood from the statement that Rowenhorst would shoot them." They added that they "walked out of Rowenhorst's store with their backs against the door." (Affidavit to criminal complaint, p.2; amended complaint, p.4.) Based on this information, Darvas reported the incident to the U.S. Attorney's Office.

D. Unlawful Arrest, Detention and Criminal Complaint

Based on the false information provided by the officers, the Assistant U.S. Attorney authorized a warrantless arrest of Petitioner. On January 23, 1991, the same day as the initial IRS visit, Petitioner was arrested at his store and detained for two days. On January 24, 1991, Darvas filed a criminal complaint, supported by his affidavit which recited the false evidence submitted by the IRS officers. The complaint was

for criminal assault upon a federal officer, which bears a maximum sentence of three to five years. After review of the video tape, the prosecutor successfully moved to dismiss the complaint on April 4, 1991.

E. Petitioner's Bivens Complaint

On July 15, 1991, Petitioner brought a Bivens complaint against the two officers for malicious prosecution and for violation of constitutional rights, including, *inter alia*, Fourth and Fifth Amendment rights. The complaint was amended on November 20, 1991. On January 13, 1992, the District Court dismissed the action on the following grounds:

1. Petitioner failed to allege violation of a clearly-established constitutional right.

2. Petitioner failed to state a claim sufficient to overcome Respondents' qualified immunity defense.

3. Petitioner failed to satisfy the heightened pleading standard.

F. Ninth Circuit Affirms

On December 30, 1992, in an unpublished opinion[1], the Ninth Circuit affirmed, finding that, since Respondents

> are neither law enforcement officers, nor were they involved in the decision to arrest or file criminal charges against [Petitioner],

that they "cannot be held liable for causing [Petitioner's] arrest, detention or attempted prosecution." Id., App. 9a-10a. Moreover, the Ninth Circuit held that Petitioner failed to plead a clearly-established right violated by Respondents'

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[1] The court did not address the "heightened pleading standard," fn. 3, App. 12a. The issue was subsequently addressed by this Court in Leatherman v. Tarrant, ___ U.S. ___, 113 S.Ct. 1160 (March 3, 1993) (federal court may not apply heightened pleading standard). Leatherman was referred to the Ninth Circuit by petitioner after he filed his motion for rehearing and suggestion for rehearing *en banc*.

conduct.[2]

G. Petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* Denied

On July 8, 1993, Petitioner filed his Petition for Rehearing and Suggestion for Rehearing *en banc*, pointing out to the Ninth Circuit that their decision was contrary to other decisions in this Court, the Ninth Circuit, and in other circuits: an officer who knowingly presents false evidence to a prosecutor or magistrate is not immune from suit for violation of civil rights. The petition and suggestion were denied on May 3, 1993.

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[2] The panel impliedly held that the officers were entitled to qualified immunity because Petitioner failed to plead a clearly-established right which was violated.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NINTH CIRCUIT IS CONTRARY TO THE VIEWS EXPRESSED BY THIS COURT IN A SUBSEQUENT OPINION, BUCKLEY V. FITZSIMMONS, ___ U.S. ___ (June 24, 1993)

On June 24, 1993, this Court decided that even a prosecutor does not enjoy absolute immunity for a civil rights suit which seeks damages. The prosecutor allegedly fabricated false evidence during the preliminary investigation and made false statements at a press conference announcing the return of the indictment. Buckley v. Fitzsimmons, ___ U.S. ___ (June 24, 1993). A prosecutor is entitled only to qualified immunity with respect to such actions. How can it be stated that an IRS collection officer is entitled to greater immunity than a prosecutor? See also Burns v. Reed, 111 S.Ct. 1934 (1991) (prosecutor not entitled to absolute immunity for legal advice to police during

investigation). Nor are other federal and state officials entitled to absolute immunity: Forrester v. White, 484 U.S. 219 (1988) (members of federal prison's "Institution Discipline Committee" not entitled to absolute immunity); Cleavinger v. Saxner, 747 U.S. 195 (1985) (judge not entitled to absolute immunity for administrative decision).

The decision of the Ninth Circuit in effect holds that federal officers who are other than "law enforcement officers," such as IRS revenue agents (examination/audit) or revenue officers (collection), are absolutely immune from liability for violation of constitutional rights where the evidence is clear that the IRS officer fabricated evidence which results in loss of liberty and deprivation of due process in violation of the Fourth and Fifth Amendments, respectively. As this Court recognized in Buckley, "most

public officials are entitled only to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1992); Butz v. Economou, 438 U.S. 478, 508 (1978)."

Under the qualified immunity standard, the official is not subject to damages for liability if: their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S., at 818. Respondents here can hardly complain that their conduct did not violate clearly-established statutory or constitutional rights of which a reasonable person would have known, given case precedent in this Court, the Ninth Circuit, and other circuits. By extensive case precedent, the officers were clearly on notice that an officer cannot fabricate false evidence or lie with impunity, where the falsehoods cause other officials to

act to the detriment of the citizen. See argument IV, *infra*, for case law development.

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH DECISIONS IN SEVEN OTHER CIRCUITS: THE THIRD, FOURTH, FIFTH, SEVENTH, EIGHTH, TENTH AND D.C. CIRCUITS

Other circuit courts have been called upon to answer the question: can an officer be liable for violation of civil or constitutional rights where the officer knowingly submits false information to the prosecutor? The question has been answered in a resounding affirmative in the Fourth, Fifth, Seventh, Eighth, Tenth and D.C. Circuits.

As recently as October 5, 1992, the Fifth Circuit answered in the affirmative in Doe v. Louisiana, 974 F.2d 39 (5th Cir. 1992). In that case, plaintiff sued case workers of the Office of Community Services, alleging that they submitted false statements in which they claimed

plaintiff had sexually abused his daughter. The officers pled qualified immunity and argued that plaintiff had not "asserted a violation of a known constitutional right."

The Fifth Circuit held that plaintiff's complaint was sufficient, in that it alleged violation of "the right to be free from bad faith and malicious prosecution:"

> This single recognized constitutional right is sufficient to support plaintiff's complaint and allow him to prevail in defendants' motion to dismiss.

Likewise, the Seventh Circuit recently held that law enforcement officers and laboratory technicians are not to escape liability by virtue of a prosecutor's independent decision to prosecute, where the complaint alleges fabrication of false evidence by the officials. Jones v. City of Chicago, 856

F.2d 985 (7th Cir. 1988) (officers and others cannot "hide behind the officials whom they have defrauded").

Five other circuits have had no difficulty with the causation issue: DeLoach v. Bevers, 922 F.2d 618, 622 (10th Cir. 1990) (detective prepared "intentionally false and misleading affidavit"); Goodwin v. Metts, 885 F.2d 157, 160 (4th Cir. 1989) (police officer withheld exculpatory evidence from prosecutor); Myers v. Morris, 810 F.2d 1437, 1457 (8th Cir. 1987) (detectives perpetrated fraud upon judicial officers; "judicial deception, or perjury, is not objectively reasonable conduct"); Jennings v. Schuman, 567 F.2d 1213, 1216 (3rd Cir. 1977) (police officer's false statements provided basis for criminal prosecution). See also Olson v. Tyler, 771 F.2d 277, 281 (7th Cir. 1985) (police officer "recklessly disregarded the

truth;" valid warrant immunizes only those that act in "objectively reasonable manner;" plaintiff "clearly was deprived of his liberty in the most traditional sense of the word").

III. THE DECISION OF THE NINTH CIRCUIT IS CONTRARY TO THE VIEWS EXPRESSED BY THE NINTH CIRCUIT IN PRIOR CASES

The Ninth Circuit panel held that the IRS officers are entitled to qualified immunity because:

> Defendants are neither law enforcement officers, nor were they involved in the decision to arrest or file criminal charges against Rowenhorst. Thus, Defendants cannot be held liable for causing Rowenhorst's arrest, detention or attempted prosecution. See Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991). Id., App. 9a-10a.

The Panel's decision is in direct conflict with previous Ninth Circuit decisions: Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978) (anyone who sets in motion a series of acts by others,

which the actor knows or reasonably should have known could cause others to inflict a constitutional injury, is liable) and Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) (qualified immunity may be rebutted by showing that the officers submitted false information to others which led to the decision to arrest and prosecute). The problem here, simply put, is that, in 1991, the Ninth Circuit strayed from its own precedent with its Fry decision, a decision which fails to mention Johnson or Smiddy.

In Smiddy v. Varney, *supra*, the Ninth Circuit addressed the filing of a criminal complaint by a prosecutor who exercised independent judgment in determining probable cause for an arrest and whether an officer would be immune from damages, stating:

> Also, the presentation by the officers to the District Attorney of information known by

> them to be false, will rebut the presumption [of independent judgment by the District Attorney].

Liability for civil damages insofar as Respondents' conduct caused Petitioner to be arrested, unlawfully detained, and prosecuted, does not hinge on whether Respondents are law enforcement officers, or involved in the decision to arrest and file criminal charges. Rather, liability hinges on whether Respondents, as officers of the IRS, set in motion a series of acts by others (Inspector Darvas and the prosecutor) which the Respondents knew, or reasonably should have known, would cause others to inflict the false arrest, unlawful detention or prosecution.

The Ninth Circuit decision clearly overlooks this principle of law. Rather, the panel relies on Fry v. Melaragno, *supra*. The Fry case is, at worst, distinguishable from the instant case for

reason that in Fry, the IRS revenue agent did not conspire with others to have false criminal charges filed. IRS agents in Fry did not lie to others. Fry pled guilty to one count of conspiracy and received a five-year sentence. Id. at 834. At best, Fry is incorrectly decided, given Smiddy, *supra*, cases of seven other circuits, *supra*, and this Court's decision last month in Buckley, *supra*.

IV. THE DECISION OF THE NINTH CIRCUIT WILL HAVE GRAVE PRACTICAL CONSEQUENCES AND THE ISSUE IS ONE OF NATIONAL IMPORTANCE

A. Overview

The Ninth Circuit decision substantially affects a rule of national application for which there is an overriding need for national uniformity. It is a general maxim that "a man is responsible for the natural consequences of his own actions." Monroe v. Pape, 365 U.S. 167, 187 (1961). Officers or agents

of the IRS (in this case, revenue officers) who are not employed in the capacity of "law enforcement officers" are, in effect, immune from suit because of their employment status. Since it is a general maxim that an individual is responsible for the natural consequences of his own actions, Respondents are likewise responsible for their actions and should be held liable for the same, despite their employment status as revenue officers. It is grossly unjust to hold law enforcement officers, and even prosecutors and judges, liable, but not revenue officers who have clearly engaged in illegal conduct resulting in the arrest and detention (loss of liberty) of the Petitioner.

Accordingly, there is an overriding need for national uniformity in that the Ninth Circuit's decision substantially affects the general maxim that "a man is

responsible for the natural consequences of his actions." The Ninth Circuit would have IRS officers continue to fabricate false evidence against innocent citizens, with impunity. Just like the police officers and lab technicians in Jones, *supra*, IRS collection officers cannot "hide behind the officials whom they have defrauded."

B. Petitioner's Fourth Amendment Claim

Petitioner alleged that Respondents violated his Fourth Amendment rights by causing him to be arrested and detained, pursuant to a an intentionally false and misleading affidavit. Neither the U.S. Attorney's "decision" to concur with Darvas that a warrantless arrest of Petitioner "was in order", or Darvas's "decision" to prepare and file the criminal complaint, will shield the Respondents from liability, when it is the

Respondents who deliberately supplied the false and misleading information which influenced the "decisions" of others.

As will be discussed *infra*, Respondents have been instrumental in the Petitioner's arrest and confinement. They cannot escape liability by pointing to the decisions of others; i.e., prosecutors, magistrates, or other federal officials, to arrest or prosecute. They cannot hide behind the officials whom they have defrauded.

The Fourth Amendment right of which Petitioner complains was clearly established at the time of the alleged incident. Thus, as will be discussed, Respondents are not immune.

C. Petitioner'S Fifth Amendment Claim

Petitioner' amended complaint alleged that as a result of Respondents' wrongful conduct (Respondents falsely swearing to

allegations of misconduct by Petitioner), Petitioner was unlawfully detained and imprisoned for two days, all without a warrant, probable cause or any lawful cause.

Upon arrival at the federal detention center in Los Angeles, Petitioner underwent a body cavity search, was interrogated, placed in a holding cell, and eventually transferred to the federal courthouse in Los Angeles in leg restraints and handcuffs. By reason of conduct of the Respondents, Petitioner was injured in his mental and physical health, suffering emotional distress and anguish, as well as physical distress, which caused a need to seek medical and psychological counseling. (Amended complaint, paragraphs 11, 16-18.) Affecting Petitioner's arrest and detention deprived him of his liberty, without due process of law. (Amended complaint, paragraph

19(b).)

As will be discussed *infra*, when an individual is deprived of his liberty pursuant to an arrest that does not conform to the requirements of the Fourth Amendment, he is deprived of his liberty without due process of law. Thus, Petitioner's complaint states a claim upon which relief can be granted, and Respondents are not entitled to immunity.

D. Petitioner's Right Was Clearly Established at the Time of Respondents' Actions

1. The Fourth Amendment Requires a Truthful Factual Showing Sufficient to Constitute Probable Cause

It is clearly established that the Fourth Amendment requires a truthful factual showing, sufficient to constitute probable cause. Conduct which results in an affidavit that contains inaccurate and untruthful statements as the term is defined in Franks v. Delaware, 438 U.S.

154 (1977) violates the arrestee's Fourth Amendment rights. Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) (where an affidavit contains statements known to be false, or where the affidavit recklessly disregards the truth and contains no accurate information sufficient to constitute probable cause, the officer cannot be said to have acted in an objectively reasonable manner; the shield of qualified immunity is lost); Kennedy v. Los Angeles Police Department, 901 F.2d 702, 706 (9th Cir. 1989) (it is clearly established that an arrest without probable cause violates the constitution; Hopkins v. City of Sierra Vista, Arizona, 931 F.2d 524, 527 (9th Cir. 1991) (in a §1983 action, the factual matters underlying the judgment of reasonableness generally means that probable cause is a question for the jury); Olson v. Tyler, 771 F.2d 277 (7th Cir, 1985) (inaccurate

and untruthful statements contained in an affidavit in preparing a warrant violate an arrestee's Fourth Amendment right); DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) (where probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, not only does the arrest violate the Fourth Amendment, the officer is not entitled to immunity); Stewart v. Donges, 915 F.2d 572, 582 (10th Cir. 1990) (we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth Amendment right to knowingly or recklessly omit from the arrest affidavit information which, if included, would have vitiated probable cause).

In summary, when a defendant knowingly makes false statements and

provides inaccurate information to constitute probable cause, and that affidavit is relied on to affect an arrest, as is the case here, an individual's Fourth Amendment right has been violated. Malley v. Briggs, 475 U.S. 335 (1986) (only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost). The fact that Respondents did not submit the affidavit to a magistrate, make the arrest, or authorize the arrest of Petitioner, does not shield their illegal conduct from liability. Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) (we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney

files charges, unless the presumption of an independent judgment by the district attorney, is rebutted.) As will be discussed *infra*, Respondents cannot hide behind the decisions of others involved in Petitioner's arrest and decision to charge, when Respondents deliberately supplied misleading and false information that influenced the decisions of others to arrest and file criminal charges.

Petitioner's right under the Fourth Amendment was clearly established at the time of Respondents' conduct.

2. An Arrest Which Does Not Conform to the Requirements of the Fourth Amendment Deprives an Individual of His Liberty and Violates Due Process

The Fourth Amendment defines the "process that is due" for an arrest of a person; it requires the government to provide a fair and reliable determination of probable cause to a judicial officer,

before, or in some instances, after an arrest. As was made clear, a finding of probable cause based solely upon information found to be false, or supplied by an officer in reckless disregard of the truth, is not a fair and reliable determination of probable cause. Thus, an arrest which does not conform to the requirements of the Fourth Amendment deprives the individual of liberty without due process of law. Olson v. Tyler, *supra*, at 282 (when an individual is deprived of his liberty pursuant to an arrest which does not conform to the requirements of the Fourth Amendment, he is deprived of liberty without due process of law); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (after a person's arrest, continued confinement or prosecution passes over from the Fourth Amendment to the due process clause).

Petitioner's arrest and confinement

as set forth in the amended complaint clearly established a due process violation.

E. Respondents are Not Immune from Suit Under the Doctrine of Qualified Immunity

1. The "Harlow" Test

Since Harlow v. Fitzgerald, 457 U.S. 800 (1982), government officials enjoy qualified immunity from liability for civil damages, as long as their conduct does not violate any "clearly established" constitutional right which a reasonable person should have known. However, in Anderson v. Creighton, 483 U.S. 635 (1987), the Supreme Court refined this objective standard, instructing that the right violated must exist in a "particularized," and not general sense, and that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640.

See also DiMartini v. Ferrin, 889 F.2d 922, 927 (9th Cir. 1989) (specifically, the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right); and Gutierrez v. Municipal Court, 838 F.2d 1031, 1048 (9th Cir. 1988) (in some cases, it may be more proper to inquire whether the particular act by the public official constitutes a violation of the right involved, rather than whether the right itself is clearly established). Thus, an assertion of qualified immunity is a defense which must be pled and proved by the defendant official.

2. Burden of Proof

The defendant official pleading the defense of qualified immunity bears the burden to show that either the law was not clearly established at the time of plaintiff's alleged injury, or if a law

was clearly established, that a reasonable official would not have known that what he was doing violated that right. Anderson v. Creighton, *supra*; Malley v. Briggs, 475 U.S. 335 (1986) (in determining defendant's entitlement to qualified immunity, the relevant question is "whether a reasonably well trained officer in petitioner's position would have known that the affidavit failed to establish probable cause and that he should not have applied for the warrant). Fry v. Melaragno, 939 F.2d 832, 838 (9th Cir. 1991) (IRS agent is entitled only to qualified immunity and not absolute immunity).

Petitioner submits that the constitutional rights violated by Respondents under the Fourth and Fifth Amendments were clearly established at the time of the alleged violation; such rights existed in a particularized, and not

general sense, and were sufficiently clear that a reasonable IRS collection officer would understand that what he is doing violated that right.

3. Respondents Are Not Entitled to Qualified Immunity

Rights Were Clearly Established

As previously discussed, Petitioner's rights under the Fourth and Fifth Amendment were clearly established at the time of the Respondents' actions. Further, the fact that the Respondents did not arrest the Petitioner, did not authorize the arrest, did not submit an affidavit to any magistrate, does not excuse Respondents from liability; Respondents cannot escape liability by pointing to the decisions of others, when it is those others that Respondents have defrauded and misled.

Requisite Causal Connection Establishes Liability

In constitutional tort cases, as in other cases, "a man is responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961). Personal participation is not the only predicate for liability, as stated by the Ninth Circuit in Johnson v. Duffy, 588 F.2d 740, 743-744 (1978).

Thus, the Ninth Circuit's decision that the Respondents are entitled to qualified immunity because they did not submit an affidavit to any magistrate, arrest anyone, or authorize the arrest of anyone, is at odds with the Petitioner's Fourth Amendment rights and the law, which were clearly established at the time of Respondents' actions. Further, the decision by the U.S. Attorney to dismiss the criminal complaint rebuts the presumption that Respondents are immune

because the prosecutor made the decision to arrest. The prosecutor was misled by Respondents. After learning of Respondents' illegal acts, the criminal complaint was dismissed, and rightfully so.

4. The Case of Fry v. Melaragno Is Not Controlling

The Ninth Circuit and the district court relied on Fry v. Melaragno, 932 F.2d 838 (9th Cir. 1991) in finding that Petitioner's amended complaint did not state a cognizable claim for violation of a constitutional right which was clearly established at the time of the Respondents' actions, or state a claim which would circumvent a defense of qualified immunity. Fry, *supra* is distinguishable from the instant case.

In Fry, Fry was charged in a seven-count indictment with conspiracy to defraud the government and other tax-

related offenses, based on selling illegal tax shelters. Fry pled guilty to one count of conspiracy and received a five-year sentence, which was affirmed. Id. 834.

While in jail, IRS audited the Frys and determined that there was a deficiency for the years 1977 to 1980. The Frys challenged the deficiencies in Tax Court and the Tax Court litigation was resolved against them.

In 1989, the Frys commenced a Bivens action for damages against various federal defendants, including IRS attorneys. The Frys claimed that the defendants retaliated against them for exercise of their First Amendment rights. Id. at 834. The Ninth Circuit, in addressing the allegations against the IRS attorneys, found that the attorneys' official conduct in representing the government in the litigation in Tax Court entitled them to

absolute immunity. Id. 838.

In regard to the IRS revenue agent, the Court concluded that the agent was entitled to qualified immunity because the agent did not have the authority to cause the criminal charges to be brought. Therefore, the agent could not be held liable for causing the prosecution. Id. at 839. The responsibility for initiating prosecution in the criminal case was with the U.S. Attorney. But of note is the fact the agent did not lie to others in authority.

In addition, the Frys' other allegations did not reveal a violation of a clearly established right; the gathering of evidence for a Tax Court trial and communicating details of the agents' investigation to persons involved in Fry's sentencing did not infringe on any clearly established right. Again, the agent did not lie. Thus, the agent was entitled to

qualified immunity. Id. at 839.

Unlike the case of Fry, Respondents, by the lies, caused the arrest of Petitioner. Without Respondents' false statements and misrepresentations to other governmental personnel, the criminal complaint would not have been filed against Petitioner and Petitioner would not have been arrested. As previously discussed, Respondents cannot claim immunity when they misled other government personnel to the end that the Petitioner is arrested and detained. Thus, Fry is not dispositive of the immunity claim raised by Respondents in this case.

5. Respondents' Conduct Was Egregious

In Elder v. Holloway, No. 91-35146, Slip Op. (9th Cir., Sept. 17, 1992), the Ninth Circuit made explicit what was implicit in Backland v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985): plaintiff

need not cite to a case on point in his favor to show that his rights were clearly established "when the conduct complained of is so egregious that any reasonable person would have recognized a constitutional violation." Id. at 11533, fn.3 and 11535.

Petitioner submits "this is such a case." Thus, Petitioner need not identify the body of law which proves that the right was so clearly established that a reasonable officer would be alerted to its constitutional parameters. As will be discussed *infra*, Respondents' conduct was so egregious that any reasonable person would have recognized a violation of Petitioner's rights.

Respondents lied to the end that not only did they falsely accuse Petitioner of a crime he did not commit, resulting in his loss of liberty, but in so doing, they also committed a criminal act under 18

U.S.C. §1001 by lying to an IRS official, the independent investigator, Darvas. It cannot honestly be said that their conduct was not egregious.

A requirement that probable cause exists for an arrest is a clearly settled principle of law; probable cause simply means that a person in Respondents' position would have reasonably believed that a crime had been committed. In this case, the question is not what technical legal rule or precedent applies; rather, it is whether a given set of facts meets the standard of a known rule. This requires the factual and practical considerations of everyday life upon which reasonable and prudent people, not legal technicians, act. Respondents obviously made the decision to lie to Darvas by falsely accusing Petitioner of assault, a felony offense. Such conduct is not only egregious, but if allowed to be shielded

by a claim of qualified immunity, sanctions "a government by men and not by law."

CONCLUSION

IRS collection officers should be treated no differently than law enforcement officers, laboratory technicians, prosecutors and judges: they are initially afforded qualified immunity from civil rights and Bivens suits for damages. Where IRS collection officers fabricate false evidence which leads to loss of liberty for the innocent citizen, the officers have obviously violated "clearly-established constitutional rights of which a reasonable person would have known" and are not, therefore, entitled to qualified immunity. The case should not, as the Ninth Circuit holds, turn on whether or not the federal or state official is a "law enforcement officer."

The petition for writ of certiorari

should be granted.

Respectfully submitted this 28th day of July, 1993.

MacPHERSON & McCARVILLE, P.A.

By _____

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55199
D.C. No. CV-91-0385-AHS(RW)

CHRIS ROWENHORST,

Plaintiff-Appellant,

v. ORDER

VIOLA MITCHELL, et al.,

Defendants-Appellees.

BEFORE: **TANG, NOONAN** and **T. G. NELSON**, Circuit Judges

The panel has voted to deny Rowenhorst's Petition for Rehearing and to reject the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc*, and no active judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The Petition for Rehearing is denied, and the suggestion for rehearing *en banc*

is rejected.

ENTERED BY ORDER OF THE COURT

Cathy A. Catterson, Clerk

Filed: May 3, 1993

APPENDIX B

No. 92-55199

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS ROWENHORST,

Plaintiff-Appellant,

v.

ON APPEAL from the United States District Court for the Central District of California

VIOLA MITCHELL; TRACY L. BROWN,

Defendants-Appellees.

Decided and Filed: December 30, 1992

Unpublished

Before: TANG, NOONAN and NELSON, Circuit Judges.

Chris Rowenhorst appeals the District Court's dismissal of his action against Internal Revenue Services Officers Viola Mitchell and Tracy L. Brown. Rowenhorst alleged that the Defendants violated his Fourth, Fifth and Fourteenth Amendment rights by falsely reporting that he assaulted them following his refusal to make payment for delinquent federal income taxes. The District Court dismissed the action on the grounds that Rowenhorst failed to allege either a violation of a clearly established constitutional right, or a claim sufficient to overcome the Defendants' qualified immunity defense. We have jurisdiction under 28 U.S.C. §1291, and we affirm.

I.

Background

On January 23, 1991, Defendants

Mitchell and Brown met Rowenhorst at his place of business to collect an outstanding federal income tax liability owed by Rowenhorst. Rowenhorst informed the officers that he could not pay the liability and refused to permit the officers entry onto his property to seize his assets to satisfy the liability. The officers then informed Rowenhorst that the IRS would seek a court order to enter his property and seize his assets. From this point the parties' versions of the facts differ.

The Defendants claim that Rowenhorst lifted his shirt and displayed a handgun in the waistband of his pants. Rowenhorst allegedly placed his hand on the gun and stated: "what do you want me to do, kill?" Rowenhorst allegedly also threatened to commit suicide. The officers perceived Rowenhorst's statements as a personal threat and left his place of business.

The officers reported the incident to IRS Inspector Peter Darvas who in turn reported the incident to the United States Attorney's Office. Inspector Darvas and other IRS inspectors went to Rowenhorst's place of business and arrested him without a warrant. Rowenhorst was charged in a criminal complaint with assault upon an officer and interference with an officer in the performance of her official duties. This complaint was subsequently dismissed by the United States Attorney.

Rowenhorst claims that upon the officers' demand for payment of his tax liability, he informed them that he was unable to pay and requested arrangement of a payment plan. The officers then allegedly left Rowenhorst's place of business without further incident. Rowenhorst claims that at no time did he threaten or assault either officer, or threaten to commit suicide.

On July 15, 1991, Rowenhorst filed the present action alleging that Defendants' false statements to Inspector Darvas caused him to be wrongfully arrested and detained. Upon the government's motion, the District Court dismissed the complaint without prejudice for failure to state a claim of violation of a clearly established right and for failure to meet proper pleading standards. Rowenhorst filed an amended complaint which the District Court subsequently dismissed with prejudice on the same grounds as dismissal of the original complaint. Rowenhorst timely appeals.

II.

Merits

We review de novo the District Court's dismissal of an action for failure to state a claim. Tanner v. Heise, 879 F.2d 572, 576 (9th Cir. 1989).

Government officials sued under

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) are entitled to qualified immunity "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1992). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Thus, the unlawfulness of the action must be apparent under preexisting law. Roth v. Veteran's Admin., 856 F.2d 1401, 1404 (9th Cir. 1988). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell v.

Forsyth, 472 U.S. 511, 526 (1985).

Here, Rowenhorst complains that Defendants made false statements to Inspector Darvas concerning the events that took place in Rowenhorst's place of business. Rowenhorst claims that these allegedly false statements demonstrate a subjective unlawful intent to mislead law enforcement authorities. Rowenhorst also claims that he has an in-store security video tape which demonstrates the alleged falsity of the Defendants' statements. Rowenhorst argues that as a result of Defendants' conduct law enforcement officials unlawfully detained and imprisoned him for two days "without warrant, probable cause, or any lawful cause."

It is undisputed, however, that Defendants are neither law enforcement officers nor were they involved in the decision to arrest or file criminal

charges against Rowenhorst. Thus, Defendants cannot be held liable for causing Rowenhorst's arrest, detention, or attempted prosecution. See Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991) (IRS revenue agent alleged to have (1) conspired with others to have false criminal charges filed against plaintiff, (2) intentionally lied to probation officer who prepared presentence report, and (3) helped in investigation of plaintiff, not liable for constitutional violations allegedly flowing from these activities).

Although Rowenhorst also alleges that Defendants' conduct violated the "laws, guidelines, procedures, and rules" of the IRS, Rowenhorst fails to specify which particular provision Defendants violated. Moreover, at the hearing on Defendants' motion to dismiss Rowenhorst's first amended complaint, Rowenhorst's counsel

stated:

> [W]e might be able to demonstrate a specific statute which was violated in making false representations to a federal official in support of a warrantless arrest.
>
> . . . .
>
> I can't specifically give you the statute now, but it seems to me that conduct of this nature in falsely stating to a federal enforcement official that there are grounds for an arrest of an individual should be criminalized or should violate some regulation either of the IRS or some general criminal statute.
>
> . . . .
>
> [T]here must be something in the conduct of these two defendants that violated some sort of right, either constitutional or statutory.

Thus, although Rowenhorst had ample opportunity to plead a clearly established right violated by Defendants' conduct, he failed to do so. See Id. Accordingly the District Court did not err by dismissing Rowenhorst's action for failure to state a

claim.[3] See Id.

AFFIRMED.

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[3] The District Court also dismissed the action on the alternative grounds that Rowenhorst's allegations "do not constitute either direct or circumstantial evidence of Defendants' unlawful intent in making the statements to IRS inspector Darvas which led to Plaintiff's arrest," and thus the allegations do not satisfy the heightened pleading standards of Branch v. Tunnell, 937 F.2d 1382, 1387-88 (9th Cir. 1991). Because we find that Rowenhorst failed to allege the violation of a clearly established right sufficient to overcome Defendants' qualified immunity we need not address whether Rowenhorst's pleadings satisfied the standards established in Branch.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRIS H. ROWENHORST,

Plaintiff,

v.

Civil No. SA CV-91-385-AHS(RWRx)

VIOLA MITCHELL, et al.,

Defendants.

ORDER DISMISSING CIVIL ACTION

The Court having heard counsels arguments on the Defendants' Motion to Dismiss, on January 6, 1992, and having granted said motion, hereby orders the above-entitled action dismissed.

IT IS THEREFORE ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within 90 days, to reopen

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the action if settlement is not consummated.

CLERK, U.S. DISTRICT COURT

By _____
Deputy Clerk

Filed: Jan. 13, 1992

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

(2)

Supreme Court, U.S.
FILED
OCT 4 1993
OFFICE OF THE CLERK

No. 93-159

In the Supreme Court of the United States

OCTOBER TERM, 1993

CHRIS ROWENHORST, PETITIONER

v.

VIOLA MITCHELL AND TRACY BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the allegation that internal revenue officers lied to law enforcement officers, causing petitioner to be falsely arrested and imprisoned, states a cause of action for damages against the revenue officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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In the Supreme Court of the United States

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CHRIS ROWENHORST, PETITIONER

v.

VIOLA MITCHELL AND TRACY BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is unpublished, but the decision is noted at 981 F.2d 1259 (Table). The order of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1992. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 3, 1993 (Pet. App. la-2a). The petition for a writ of certiorari was filed on July 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This *Bivens* action arises from the following events:

a. On the afternoon of January 23, 1991, Internal Revenue Service officers Viola Mitchell and Tracy Brown met with petitioner at his place of business in Fullerton, California (Pet. App. 4a-5a). At the meeting, Officer Mitchell requested payment from petitioner of an outstanding income tax liability. Petitioner stated that he could not pay the amount due (*id.* at 5a). Officer Mitchell then asked petitioner for permission to enter the premises of his business for the purpose of seizing petitioner's assets. Petitioner refused (*ibid.*).

Officer Mitchell explained to petitioner that, if he refused to allow the officers to seize his assets, the IRS would seek a court order permitting them to enter and seize the property (Pet. App. 5a). According to Mitchell, petitioner became upset and raised his shirt to show the revenue officers that he had a gun in the waistband of his pants (CR 10, Exh. A).[1] Petitioner placed his hand on the gun and asked, "[W]hat do you want me to do, kill?" (Pet. App. 5a). Mitchell understood this as a threat against her (CR 10, Exh. A). Petitioner also threatened to commit suicide (Pet. App. 5a). After further discussion, Mitchell and Brown left petitioner's place of business (*ibid.*).

b. Mitchell promptly reported the incident to IRS Inspector Peter Darvas (Pet. App. 6a). After Darvas consulted with the United States Attorney's office, he and other IRS inspectors and a Fullerton police officer went to petitioner's place of business and arrested him (*ibid.*). The officers found petitioner in possession of a handgun

[1] "CR" references are to the docket control numbers assigned to the documents in the original record on appeal by the clerk of the district court.

(CR 10, Exh. A). Petitioner was charged with assault upon Mitchell and with interference in her performance of official duties (*ibid.*). The criminal complaint against petitioner was dismissed on April 4, 1991, upon motion by the United States (CR 10, at 4-5).

2. On July 15, 1991, petitioner filed a civil action against Mitchell and Brown in their individual capacities, seeking five million dollars in compensatory and punitive damages (Pet. App. 7a; CR 10, at 6). In the complaint, petitioner did not deny that he had been in possession of a handgun or that he had showed it to the revenue officers during the January 23 meeting. Petitioner did, however, deny that he had threatened Mitchell (CR 10, at 4). He charged that Mitchell had made false statements to Inspector Darvas and that petitioner had been arrested and imprisoned in violation of his constitutional rights to due process and to be free from unreasonable searches and seizures (*id.* at 4-5).

The revenue officers asserted the defense of qualified official immunity and moved to dismiss the complaint. The district court dismissed petitioner's complaint, without prejudice, on the ground that it failed to state a claim upon which relief could be granted (Pet. App. 7a). In an amended complaint, petitioner repeated his original allegations and additionally alleged that he possessed a videotape recording of the January 23 meeting that supported his version of the events (CR 10, at 3-4). Petitioner did not state in his amended complaint what, if anything, the videotape showed that supported his allegations.

The district court granted the revenue officers' motion to dismiss the amended complaint. The court ruled that petitioner had failed to allege either a violation of a clearly established constitutional right or a claim sufficient to overcome the qualified immunity of the revenue officers from suit (Pet. App. 4a).

3. The court of appeals affirmed (Pet. App. 3a-12a). The court concluded that petitioner had failed to demonstrate that the revenue officers had violated any clearly established constitutional right (*id.* at 11a). Relying on *Fry* v. *Melaragno*, 939 F.2d 832 (9th Cir. 1991), the court further held that, because Mitchell and Brown were "neither law enforcement officers nor were they involved in the decision to arrest or file criminal charges against [petitioner]," they could not be held liable for any alleged constitutional error in his arrest and imprisonment (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that a violation of the Constitution by a federal agent acting under the color of his official authority may give rise to a cause of action for damages against the agent in his individual capacity. A public official, however, is entitled to qualified immunity from suit unless the complaint demonstrates that the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has emphasized that "in the light of pre-existing law the unlawfulness [of the act] must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

A plaintiff bringing a *Bivens* action thus bears the burden of showing that the right allegedly violated was clearly established at the time of the incident. *Upton* v. *Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), cert. denied, 112 S. Ct. 1262 (1992); *Pueblo Neighborhood Health*

Centers, Inc. v. *Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). If the plaintiff's allegations fail to state a claim of violation of a clearly established right, the defendant pleading qualified immunity is entitled to dismissal of the action before the commencement of discovery. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Petitioner's amended complaint failed to meet this requirement and was correctly dismissed by the district court. Petitioner "not only failed to allege the violation of a constitutional right that was clearly established at the time of [respondents'] actions, but he failed to establish the violation of any constitutional right at all." *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1793-1794 (1991). In the amended complaint, as well as at the hearing on the motion to dismiss, petitioner did not cite any authority from which the district court could have found that the revenue officers violated any of petitioner's clearly established constitutional rights.[2] Petitioner made only general references to the Fourth Amendment prohibition against unreasonable searches and seizures and to his right to due process of law. See Pet. App. 10a-11a. As this Court has emphasized, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant,

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[2] At the hearing on the motion to dismiss, petitioner's counsel stated (Pet. App. 11a):

> I can't specifically give you the statute now, but it seems that conduct of this nature in falsely stating to a federal enforcement official that there are grounds for an arrest of an individual should be criminalized or should violate some regulation either of the IRS or some general criminal statute.
>
> . . . .
>
> [T]here must be something in the conduct of these two defendants that violated some sort of right, either constitutional or statutory.

sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. at 640. Because petitioner failed to show that respondents violated any clearly established consititutional right, his amended complaint was correctly dismissed.

b. In *Flood* v. *Harrington*, 532 F.2d 1248 (9th Cir. 1976), a taxpayer brought an action for damages against an IRS official for having "caused" a judicial action for collection of taxes to be brought when that official "knew" the taxpayer owed no tax. The court of appeals held that an IRS official "cannot be held liable for 'causing'" the judicial prosecution of a tax claim. *Id.* at 1251. As the court stated, "[t]he responsibility for that prosecution lay with the United States Attorney General or his delegate" and not with the IRS officer who is responsible for administrative collection of the taxes. *Ibid.*

The court of appeals reached the same conclusion in *Fry* v. *Melaragno*, 939 F.2d 832 (9th Cir. 1991). In that case, the taxpayer alleged that a federal revenue agent had conspired with others to bring false criminal charges against him and had lied to the probation officer preparing the taxpayer's presentence report. Relying on *Flood* v. *Harrington*, *supra*, the court held that the revenue agent was entitled to qualified immunity from suit because the officer did not have authority to "cause" criminal charges to be brought. *Fry* v. *Melaragno*, 939 F.2d at 839. Under the *Fry* and *Flood* decisions, it was thus "clearly established" that revenue officers were *not* liable under the Constitution for damages under the facts alleged in the amended complaint.[3]

[3] There is no merit to petitioner's attempt to distinguish *Fry* v. *Melaragno* on the theory that the "IRS agents in *Fry* did not lie to

2. a. Petitioner errs in contending that decisions from other circuits support his claimed cause of action. The decisions on which petitioner relies (Pet. 12-15) are inapposite. They all involve suits brought under 42 U.S.C. 1983 against police officers acting under state law who allegedly made misrepresentations in affidavits for search warrants.[4] It is well settled that Section 1983 suits may be brought against law enforcement officers. See, *e.g.*, *Branch* v. *Tunnell*, 937 F.2d 1382 (9th Cir. 1991). These cases do not establish that misrepresentations made by federal revenue officers in the circumstances of this case amount to constitutional violations.

b. Petitioner also errs in contending (Pet. 15-18) that the decision in this case conflicts with earlier Ninth Circuit decisions. An intra-circuit conflict of the type petitioner alleges, of course, does not warrant this Court's review. Moreover, the Ninth Circuit cases on which petitioner relies do not conflict with the decision in this case. The decisions in *Johnson* v. *Duffy*, 588 F.2d 740 (1978), and *Smiddy* v. *Varney*, 665 F.2d 261 (1981), cert. denied, 459 U.S. 829 (1982), did not involve *Bivens* claims stemming from an arrest. Instead, they were Section 1983 actions brought against state law enforcement officers. Neither case involved an alleged constitutional violation stemming from misrepresentations by federal employees to law enforcement officers.

c. There is also no merit to petitioner's assertion that the decision in this case is "contrary to the views

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others" and "did not conspire with others to have false criminal charges filed" (Pet. 18). The taxpayer in *Fry* specifically alleged that an IRS revenue agent conspired with others to bring false criminal charges against him and that the agent lied to a probation officer preparing a presentence report. 939 F.2d at 838-839.

[4] The opinion in one of the cases that petitioner cites (*Doe* v. *Louisiana*, 974 F.2d 36 (5th Cir. 1992)) has been withdrawn by the court. See 974 F.2d 38.

expressed by this Court in * * * *Buckley* v. *Fitzsimmons*, [113 S. Ct. 2606 (1993)]" (Pet. 9). *Buckley* held that prosecutors do not have absolute immunity under Section 1983 (i) when conducting investigative work to decide whether a suspect should be arrested or (ii) when making out-of-court statements to the press. 113 S. Ct. at 2616-2618. This Court's holdings in *Buckley* are not relevant to this case because respondents do not claim that they are entitled to absolute immunity.

None of the cases cited by petitioner are relevant to the question presented in this case because none of them put revenue officers "on notice" (*Todd* v. *United States*, 849 F.2d 365, 371 (9th Cir. 1988)) that their allegedly improper conduct violated petitioner's clearly established constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

JONATHAN S. COHEN
RANDOLPH L. HUTTER
Attorneys

OCTOBER 1993